



FEDERAL ELECTION COMMISSION  
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**SENSITIVE**

**VIA HAND DELIVERY**

August 8, 2001

Benjamin L. Ginsberg, Esq.  
William J. McGinley, Esq.  
Patton Boggs, LLP  
2550 M Street, N.W.  
Washington, D.C. 20037

RE: MUR 4736  
Brian Babin  
Brian Babin for Congress  
and Thomas E. Freeman, as treasurer

Dear Messrs. Ginsberg and McGinley:

Based on a complaint filed with the Federal Election Commission on August 4, 1998, the Commission, on July 20, 1999, found that there was reason to believe that Brian Babin violated 2 U.S.C. § 441a(f), and that Brian Babin for Congress and Thomas E. Freeman, as treasurer, violated 2 U.S.C. §§ 434 and 441a(f), and instituted an investigation of this matter.

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that Brian Babin violated 2 U.S.C. §§ 441a(f) and 441b, and that Brian Babin for Congress and Thomas E. Freeman, as treasurer, violated 2 U.S.C. §§ 434, 441a(a)(8), 441a(f) and 441b.

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief that you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days. Due to statute of

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limitations considerations, before granting any request for an extension of time in this matter, your clients will be required to execute an agreement to extend the statute of limitations.

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Thomas Andersen, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Lois G. Lerner  
Acting General Counsel

Enclosure  
Brief

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1 **BEFORE THE FEDERAL ELECTION COMMISSION**

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3  
4 In the Matter of )  
5 ) MUR 4736  
6 Brian Babin )  
7 Brian Babin for Congress )  
8 and Thomas E. Freeman, as treasurer )  
9  
10

11 **GENERAL COUNSEL'S BRIEF**

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13  
14 **I. STATEMENT OF THE CASE**

15 This matter was generated by a complaint filed with the Federal Election Commission  
16 ("Commission") on August 4, 1998 by Peter Cloeren and Cloeren, Inc., designated as  
17 MUR 4783, which contained specific allegations against Brian Babin and his principal  
18 campaign committee, Brian Babin for Congress and Thomas E. Freeman, as treasurer  
19 ("Babin Committee" or "Committee"). On July 20, 1999, the Commission, after transferring  
20 certain allegations from the MUR 4783 complaint and consolidating them into an ongoing matter  
21 designated as MUR 4736, found reason to believe in MUR 4736 that Brian Babin and the  
22 Babin Committee violated 2 U.S.C. § 441f, or in the alternative, 2 U.S.C. § 441a(f), by  
23 knowingly accepting a \$5,000 contribution from Peter Cloeren through Citizens United Political  
24 Victory Fund and Kevin Allen, as treasurer ("CUPVF"), and that the Babin Committee violated  
25 2 U.S.C. § 434 by failing to accurately report the source of the contribution.

26 Also in MUR 4736, the Commission found reason to believe that Brian Babin and the  
27 Babin Committee violated 2 U.S.C. § 441f, or in the alternative, 2 U.S.C. § 441a(f), by  
28 knowingly accepting \$20,000 in contributions from Peter Cloeren and his wife, Patricia, made

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1 through Citizens for Reform ("CR"), a non-profit corporation managed by Triad Management  
2 Services, Inc. ("Triad").<sup>1</sup> The Commission further found reason to believe that the Babin  
3 Committee violated 2 U.S.C. § 434 by failing to report these contributions.

4 For the reasons set forth below, this Office is prepared to recommend that the  
5 Commission find probable cause to believe that Brian Babin and the Babin Committee  
6 violated 2 U.S.C. § 441a(f) by knowingly accepting excessive contributions from Peter and  
7 Patricia Cloeren through CUPVF and CR, and that the Babin Committee violated 2 U.S.C. § 434  
8 by not reporting them or by failing to report their true source, as well as 2 U.S.C. § 441a(a)(8) for  
9 not properly reporting an earmarked contribution. This Office is also prepared to recommend  
10 that the Commission find probable cause to believe that Brian Babin and the Babin Committee  
11 violated 2 U.S.C. § 441a(f) by knowingly accepting an excessive in-kind contribution from CR,  
12 and that the Babin Committee violated 2 U.S.C. § 434 by failing to report it. Alternatively, this  
13 Office is prepared to recommend that the Commission find probable cause to believe that  
14 Brian Babin and the Babin Committee violated 2 U.S.C. § 441b by knowingly accepting a  
15 corporate contribution from CR, and that the Babin Committee violated 2 U.S.C. § 434 by failing  
16 to report it.

## 17 **II. FACTUAL AND LEGAL ANALYSIS**

### 18 **A. APPLICABLE LAW**

19 The Federal Election Campaign Act of 1971, as amended ("the Act"), defines a  
20 "contribution" as "any gift, subscription, loan, advance, or deposit of money or anything of

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<sup>1</sup> "Triad" is an acronym for Tactical Resources in American Democracy. Triad existed both as a sole proprietorship operated by Carolyn Malenick and as a corporation for which Ms. Malenick was the president and sole shareholder. Triad Inc. was incorporated on May 28, 1996, and, beginning on July 1, 1996, assumed  
(cont'd. next page)

value made by any person for the purpose of influencing any election for Federal office.”

2 U.S.C. § 431(8)(A)(i). An “expenditure” is defined as “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(9)(A)(i). The Commission has defined “anything of value” to include all in-kind contributions, i.e., “the provision of any goods and services without charge or at a charge which is less than the usual and normal charge for such goods and services . . . .” 11 C.F.R. §§ 100.7(a)(1)(iii) and 100.8(a)(1)(iv).

The Act defines a political committee as any committee, club, association, or other group of persons which receives “contributions” or makes “expenditures” aggregating in excess of \$1,000 during a calendar year. 2 U.S.C. § 431(4)(A).<sup>2</sup> For the purposes of the Act, the term “person” is defined as including “an individual, partnership, committee, association, corporation, labor organization or any other organization or group of persons . . . .” 2 U.S.C. § 431(11). In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court, in order to avoid overbreadth, construed the Act’s references to “political committee” so as to prevent their “reach [to] groups engaged purely in issue discussion.” The Court recognized that “[t]o fulfill the purpose of the Act [the designation ‘political committee’] should encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” 424 U.S. at 79.

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responsibility and began paying for various activities previously initiated by the sole proprietorship. As used in this Brief, depending on the timing, “Triad” may refer to either the sole proprietorship or the corporation.

<sup>2</sup> The Commission has issued an Advance Notice of Proposed Rulemaking, which seeks comment on proposed revisions to the definition of “political committee” currently found in the Regulations. The proposed revisions focus on possible changes to the definition of “contribution” and “expenditure” which trigger political committee status as well as ways in which a “major purpose” test might be incorporated into the rules. See Definition of Political Committee, 66 Fed. Reg. 13681(2001) (to be codified at 11 C.F.R. Part 100) (March 7, 2001).

Under the Act, no person, including a political committee, may contribute more than \$1,000 per election to any candidate for federal office or his authorized committee. 2 U.S.C. § 441a(a)(1). Pursuant to the Commission's regulations:

A person may contribute to a candidate or his or her authorized committee with respect to a particular election and also contribute to a political committee which has supported, or anticipates supporting the same candidate in the same election, as long as -

(1) The political committee is not the candidate's principal campaign committee or other authorized political committee or a single candidate committee;

(2) *The contributor does not give with the knowledge that a substantial portion will be contributed to, or expended on behalf of, that candidate for the same election; and*

(3) The contributor does not retain control over the funds.

11 C.F.R. § 110.1(h) (emphasis added).

In order to avoid excessive contributions after a donor has given the maximum amount to a candidate or his authorized committee, each of the three conditions set forth in 11 C.F.R. § 110.1(h) must be satisfied. The Act further provides that a candidate or political committee shall not knowingly accept a contribution in violation of section 441a(a)(1). 2 U.S.C. § 441a(f).

An "independent expenditure" is defined in the Act as "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any

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1 candidate or agent of such candidate.” 2 U.S.C. § 431(17).<sup>3</sup> Conversely, expenditures made by  
2 any person “in cooperation, consultation or concert, with, or at the request or suggestion of, a  
3 candidate, his authorized political committees, or their agents, shall be considered to be a  
4 contribution to such candidate.” 2 U.S.C. § 441a(7)(B)(i).

5 In the context of expenditures by outside groups which are not political party committees,  
6 the Commission has considered potential coordination that took place prior to the effective date  
7 of 11 C.F.R. § 100.23 (see footnote 2) under the standards set forth in *FEC v. Christian*  
8 *Coalition*, 52 F. Supp.2d 45 (D.D.C. 1999). In addressing the issue of what constitutes  
9 “coordination” with a candidate, the *Christian Coalition* court discussed two general ways in  
10 which coordination could occur: first, that “expressive coordinated expenditures made at the  
11 request or the suggestion of the candidate or an authorized agent” would be considered  
12 coordinated; and second, “absent a request or suggestion, an expressive expenditure becomes  
13 ‘coordinated’ where the candidate or her agents can exercise control over, or where there has  
14 been substantial discussion or negotiation between the campaign and the spender over, a  
15 communication’s: (1) contents; (2) timing; (3) location, mode or intended audience (e.g., choice  
16 between newspaper or radio advertisement); or (4) ‘volume’ (e.g., number of copies of printed  
17 materials or frequency of media spots).” *Id.* at 92.

18 With certain narrow exceptions, the Act prohibits corporations from making contributions  
19 or expenditures in connection with any election. 2 U.S.C. § 441b(a). Corporations are  
20 prohibited from making “any direct or indirect payment, distribution, loan advance, deposit, or

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<sup>3</sup> On November 30, 2000, the Commission approved a final rule concerning Coordinated General Public Political Communications. 65 *Fed. Reg.* 76,138 (Dec. 6, 2000). The new regulation, codified at 11 C.F.R. § 100.23, became effective on May 9, 2001. See 66 *Fed. Reg.* 23,537 (May 9, 2001).

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1 gift of money or any services, or anything of value (except a loan of money by a bank in  
2 accordance with applicable laws and regulations and in the ordinary course of business) to any  
3 candidate, campaign committee, or political party or organization, in connection with any federal  
4 election.” 2 U.S.C. § 441b(b)(2). The Act further provides that a candidate or political  
5 committee shall not knowingly accept corporate contributions. 2 U.S.C. § 441b(a).

6 Under the Act, any person, including a political committee, which acts as an intermediary  
7 or conduit for contributions which are earmarked or otherwise directed through a conduit or  
8 intermediary must report the original source and the intended recipient of such contribution to the  
9 Commission and to the intended recipient. 2 U.S.C. § 441a(a)(8); 11 C.F.R. § 110.6(c)(1). The  
10 recipient candidate or authorized committee shall report each conduit or intermediary who  
11 forwards earmarked contributions. 11 C.F.R. § 110.6(c)(2).

12 The Act requires each treasurer of a political committee to file reports of receipts and  
13 disbursements with the Commission. 2 U.S.C. § 434(a). Each report must disclose the  
14 identification of each political committee which has made a contribution to the reporting  
15 committee, together with the date and amount of any such contribution. 2 U.S.C. § 434(b)(3)(B).

## 16 B. FACTS

### 17 1. Background on Relevant Persons and Entities

18 Brian Babin is a dentist who has lived and worked in Woodville, Texas since 1979.  
19 Babin Deposition Transcript (“Dep. Tr.”) at 19. In 1996, Dr. Babin ran for the congressional seat  
20 in Texas’ Second District. After declaring his candidacy in late 1995, Dr. Babin faced a  
21 Republican primary challenge in March 1996, and then won the run-off election in May 1996.  
22 Dr. Babin lost the November general election to the Democratic candidate, Rep. Jim Turner.

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1 Peter Cloeren is president and CEO of a plastics manufacturing company, Cloeren, Inc.,  
2 headquartered in Orange, Texas, in the Second District. In his complaint, Mr. Cloeren claimed  
3 that, prior to meeting Brian Babin in late 1995, neither he nor his company "had ever been  
4 involved in political campaigns," and that they had never made "state or federal campaign  
5 contributions to any candidate." A review of FEC databases shows that the first federal  
6 contributions ever made by Peter and Patricia Cloeren consisted of two \$1,000 contributions to  
7 the Babin Committee, reported by the Committee as received on December 29, 1995. The  
8 Cloerens then each contributed \$1,000 to the Babin Committee for the run-off election, reported  
9 by the Committee as received on March 19, 1996. On September 9, 1996, the Babin Committee  
10 disclosed two \$1,000 contributions from the Cloerens for the general election campaign.

11 Triad is a firm established and controlled by Carolyn Malenick (see footnote 1). One of  
12 Triad's stated goals for the 1996 election cycle was to "[i]ncrease by 30 the Republican House  
13 Majority." Triad claims to have contacted approximately 250 Republican congressional  
14 campaigns during the 1996 election cycle, including Brian Babin's, in order to conduct "political  
15 audits" of their viability. Triad has stipulated that the topics that it discussed with each campaign  
16 staff during the political audits typically included, *inter alia*, the strengths and weaknesses of the  
17 candidate's opponent. Triad's political audits were overseen by Carlos Rodriguez, an  
18 experienced political consultant, with assistance from, among others, his employee Jason Oliver.

19 During 1995 and 1996, Triad contacted numerous conservative organizations,  
20 membership groups and individual activists to encourage them to form a "coalition" or  
21 "network" of political action committees ("PACs") that could work together for the purpose of  
22 supporting conservative Republican congressional candidates in the upcoming 1996 elections. In

1 a March 1996 letter sent to a number of individuals, Triad stated that "the TRIAD concept has  
2 expanded to include coordination with conservative political action committees and issue  
3 organizations that now seek our research analysis on a regular basis." Further, Triad claimed to  
4 have "taken an advisory role among key conservative political action committees" and to have  
5 "built coalitions that will provide essential targeted assistance to candidate's [sic] campaigns in  
6 winnable districts."

7 In a Triad promotional video, Carolyn Malenick stated that by working with PACs and  
8 other donors, Triad would be able to provide "rapid fire" support to conservative Republican  
9 candidates in tightly contested races where additional funds were needed in a short amount of  
10 time. In its brochure, Triad stated that one of its activities was "[w]orking with conservative  
11 political action committees and issue organizations for efforts to maximize their separate funding  
12 sources to accomplish common objectives." During 1995 and 1996, Triad representatives met on  
13 a regular monthly, and later bi-weekly, basis with a number of conservative organizations with  
14 PACs regarding their plans to support specific candidates. Representatives from several of these  
15 organizations and PACs stated that Ms. Malenick approached them about forming a "coalition"  
16 or "network" of PACs that could work together to support selected Republican candidates and  
17 offset the support that labor unions were expected to provide to Democratic candidates.

18 One of the organizations contacted by Triad was Citizens United, described by its founder  
19 and president, Floyd Brown, as an "organization dedicated to empowering conservative citizens  
20 in the political process." Brown Dep. Tr. at 37. Citizens United is the connected organization of  
21 CUPVF, a multicandidate PAC registered with the Commission. Mr. Brown testified that he  
22 does "all the fundraising" for CUPVF, and that "the main focus of [his] activities is raising the

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1 money, meeting with donors, talking to donors on the telephone.” *Id.* at 41. During the 1996  
2 election cycle, Citizens United maintained offices in Fairfax, Virginia and Washington state. *Id.*  
3 at 44-47. Mr. Brown testified that, probably in 1995, Triad director Carolyn Malenick visited  
4 him at his Fairfax, Virginia office “to explain what Triad was. . . . She said that she was a  
5 consultant to different donors. And she said would you like these donors to give to your PAC  
6 and I said sure.” *Id.* at 93-94.

7 During the summer and fall of 1995, Triad asked certain PACs, including CUPVF, to  
8 provide a one paragraph synopsis describing their philosophy and activities. Triad compiled  
9 these descriptions into a “Political Action Committees” memorandum that it began distributing  
10 to potential donors. The Triad PAC memorandum stated that “[t]he following PACs [including  
11 CUPVF] agree with TRIAD’s targeting approach for the 1996 elections.” Although Mr. Brown  
12 did not recall ever seeing the memorandum, he testified that he probably provided Ms. Malenick  
13 with the information it contained about CUPVF.<sup>4</sup> *Id.* at 95, 98-99.

14 In addition to its dealings with CUPVF during the 1996 election cycle, Triad managed all  
15 the activities of CR, a Virginia non-profit corporation incorporated by Peter Flaherty, who  
16 became its president in May 1996. CR had no offices or employees and, prior to September  
17 1996, received no funds, sponsored no activities and made no expenditures of any kind.  
18 Beginning no later than September 5, 1996, Triad began to solicit and accept funds for the  
19 purpose of funding a series of advertisements by CR. On or about September 26, 1996, Triad  
20 entered into a consulting agreement with CR, which confirmed earlier understandings between

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<sup>4</sup> During the 1996 election cycle, Triad donors (excluding Peter Cloeren) contributed \$14,250 to CUPVF. In addition, Triad donors contributed at least \$6,500 to the Babin Committee through Triad, and PACs in Triad’s coalition (excluding CUPVF) gave at least \$3,000 to the Committee.

1 Peter Flaherty and Ms. Malenick. The agreement called for Triad to provide services in  
2 connection with the placement and production of advertisements, and gave Triad discretion in  
3 deciding "the means by which it will provide the Services" for CR. CR was to pay Triad a  
4 commission on all funds raised and all direct expenses incurred for advertising efforts.

5 Triad was responsible for soliciting and accepting funds for the placement and production  
6 of advertising programs on behalf of CR. Agents of Triad, particularly Carolyn Malenick and  
7 Carlos Rodriguez, were responsible for selecting media markets, approving the scripts, and  
8 authorizing expenditures for the production and placement of advertising sponsored by CR  
9 during 1996. Although Mr. Flaherty testified that he was kept informed of Triad's activities on  
10 behalf of CR so that he could provide oversight, he did not recall providing Triad with any  
11 detailed directions on how to carry out the advertising campaigns. Flaherty Dep. Tr. at 192-93.  
12 Mr. Flaherty testified that it was CR's conscious intent to avoid engaging in express advocacy in  
13 its public advertising, so as to avoid any requirement that it report to the FEC. *Id.* at 252-53.

14 CR sponsored nineteen Triad-managed advertising campaigns in the weeks immediately  
15 prior to the 1996 congressional elections. CR expended \$1,412,313.55 to pay for the planning,  
16 production, broadcast or dissemination of television, radio, direct mail and telephone bank  
17 advertising programs. Jason Oliver, an employee of Triad consultant Carlos Rodriguez, testified  
18 that Triad selected the congressional districts for the CR advertisements based on, *inter alia*,  
19 whether they "were considered . . . top-targeted for the purposes of a takeover." Oliver Dep. Tr.  
20 at 40-41. The advertisements were "targeted in those areas so the voters could get a good  
21 contrast between the two candidates running." *Id.* CR president Peter Flaherty testified that the  
22 media markets for CR's advertisements were selected on the basis of the public officials (all of

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whom were candidates) featured in the ads.<sup>5</sup> Flaherty Dep. Tr. at 251. Each advertisement referenced and commented, either positively or negatively, on clearly identified candidates in the congressional district in which it was broadcast or distributed. As discussed later, CR paid for at least one such television advertisement to run in Texas' Second District during the general election campaign.

## 2. Initial Contacts Between Brian Babin and Peter Cloeren

Brian Babin acknowledges meeting Peter Cloeren in late 1995 outside of Cloeren, Inc.'s facilities. Babin Dep. Tr. at 69. Dr. Babin testified that he "told [Cloeren] what our campaign was all about . . . and I asked him if he would support us." *Id.* at 73. Dr. Babin recalls that Mr. Cloeren "was very favorably impressed" and told Dr. Babin that "he would think about" assisting the campaign. *Id.* at 73, 75.

Peter Cloeren states in his complaint that, when he first met Brian Babin in December 1995, Dr. Babin asked Mr. Cloeren to raise \$50,000 for his campaign. In response to Mr. Cloeren's offer to write a corporate check in that amount to the campaign, Dr. Babin allegedly told Mr. Cloeren that contributions could only come from individuals, and suggested that Mr. Cloeren "work with loyal employees" to raise the funds. Mr. Cloeren interpreted Dr. Babin's remarks as implying that Mr. Cloeren should "funnel the company money through these employees." Following this conversation, Mr. Cloeren asked several employees to make

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<sup>5</sup> Triad stated in writing that it selected media markets (which it referred to by congressional district designations) for the CR ads based on "a clear dichotomy between those individuals [congressional candidates] supporting traditional family values, conservative economic and social policies, and those [congressional candidates] arguing for the general expansion of governmental authority, increased taxes and positions contrary to traditional values. Those media markets where such advertisements would likely be overwhelmingly rejected by viewers as unpersuasive or wrong were not picked. Markets were chosen where the debate would be timely and significant, where the debate was 'hot'."

1 contributions to the Babin Committee, and informed them that they would be reimbursed for  
2 their contributions. Mr. Cloeren recalled that Dr. Babin personally picked up the conduit  
3 contribution checks at Cloeren, Inc.'s facilities.

4 From December 1995 through September 1996, Mr. Cloeren and Cloeren, Inc. illegally  
5 reimbursed 32 Cloeren, Inc. employees and their family members a total of \$37,000 for their  
6 contributions to the Babin Committee. These activities, which were investigated as part of  
7 closed MUR 4783, were also the subject of criminal proceedings in which Peter Cloeren and  
8 Cloeren, Inc. pled guilty to misdemeanor violations in the U.S. District Court for the Eastern  
9 District of Texas, and paid a total of \$400,000 in criminal fines.<sup>6</sup>

10 In his deposition, Dr. Babin denied having any knowledge, prior to learning of  
11 Peter Cloeren's guilty plea in June 1998, that any of the contributions to his 1996 campaign had  
12 been reimbursed by Mr. Cloeren or Cloeren, Inc. Babin Dep. Tr. at 151-52, 174-75. In response  
13 to the Commission's reason-to-believe ("RTB") findings, Dr. Babin states that when he first met  
14 Mr. Cloeren in late 1995, he was "told by Mr. Cloeren and several senior employees that he  
15 [Cloeren] was 'a good arm-twister' and that he would 'raise funds from friends, employees,  
16 relatives and business associates.'" However, Dr. Babin "categorically denies that he made any  
17 statements to Mr. Cloeren which could reasonably be construed as requiring, requesting,  
18 encouraging, intimating, or in any way suggesting that Mr. Cloeren should devise an illegal  
19 scheme to circumvent the campaign contribution rules."

20 In his response to the Commission's subpoena and order, Dr. Babin claimed that when

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<sup>6</sup> Although the illegal reimbursement activities and related allegations were restricted to MUR 4783, now closed, the events surrounding the reimbursements provide important contextual background leading up to Mr. Cloeren's later contacts and transactions with the Babin campaign, CUPVF, CR, Triad and associated persons.

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1 Mr. Cloeren initially offered to write a \$50,000 corporate check to the Babin Committee,  
2 "I explained to [Cloeren] that campaign finance laws did not allow for corporate contributions  
3 and that I could only accept contributions in an amount of \$1,000." Dr. Babin acknowledged in  
4 his RTB response that he "visited Cloeren Incorporated on several occasions and received  
5 campaign checks from Peter Cloeren." However, Dr. Babin testified that he never looked at the  
6 checks and did not recall having any specific discussions about them with Mr. Cloeren. Babin  
7 Dep. Tr. at 127-29.

8 **3. Events through Mid-1996**

9 Mr. Cloeren alleged that after the March 1996 primary, Dr. Babin asked Mr. Cloeren to  
10 get more "loyal employees" to write contribution checks. Mr. Cloeren states that he again  
11 understood Dr. Babin to be suggesting a funneling scheme. Mr. Cloeren again asked several  
12 employees to make contributions, which were reimbursed by the corporation. After his victory in  
13 the May run-off election, Dr. Babin wrote Mr. Cloeren asking him to raise more funds. In a  
14 handwritten note dated May 28, 1996, Dr. Babin asks Mr. Cloeren: "Can you help raise us  
15 another \$50,000?" The note also expressed Dr. Babin's desire that Mr. Cloeren "help [the  
16 campaign] by serving as our finance chair." In his deposition, Dr. Babin acknowledged writing  
17 the note and recounted that the \$50,000 figure "had come, I think, from [Cloeren]  
18 communicating to us that he had raised about that amount, and I was asking him if he could do it  
19 again." Babin Dep. Tr. at 177. Dr. Babin could not recall the substance of any such  
20 communications, but testified that Mr. Cloeren declined to serve as the campaign's "finance  
21 chair." *Id.* at 82-83, 87-89, 178. Dr. Babin testified that he had offered the position based on  
22 Mr. Cloeren's promises to raise large amounts of money. *Id.* at 83-85. Dr. Babin acknowledged

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1 writing another note, dated August 5, 1996, in which he asks Mr. Cloeren to "get the 'money-  
2 machine' going again so we can win this election. The deciding factor will be dollars for  
3 television ads." *Id.* at 87-88. The note expressed Dr. Babin's concern that his opponent was  
4 receiving "lawyer and union money out-of-district."

5 Mr. Cloeren admitted in his complaint that, through the summer of 1996, Cloeren, Inc.  
6 illegally reimbursed several more contributions made by its employees to the Babin Committee.  
7 Mr. Cloeren claimed that when he discussed these contributions with Dr. Babin during this time,  
8 Dr. Babin acknowledged that the contributions were being made by Cloeren, Inc. through  
9 company employees, and assured Mr. Cloeren that "this is the way everyone raises campaign  
10 funds and that they would not 'get caught.'" As noted earlier, Dr. Babin denies that he knew that  
11 contributions were being reimbursed through Cloeren, Inc. prior to the guilty plea by Mr. Cloeren  
12 and his company. Mr. Cloeren claimed that he also discussed the reimbursement of company  
13 employees with Walter Whetsell, who acted both as a campaign manager and political consultant  
14 for the Babin Committee during 1996.

15 As with Dr. Babin, Mr. Whetsell denied the allegations in MUR 4783 of his involvement  
16 in, or knowledge of, the reimbursement scheme. Whetsell Dep. Tr. at 94-95, 102-03.

17 Mr. Whetsell testified that he first met Peter Cloeren at a September 1996 fundraiser for the  
18 Babin campaign held at the Cloerens' residence. *Id.* at 76. While Mr. Whetsell did not recall  
19 any specific discussions with Mr. Cloeren at that time, he remembered that Mr. Cloeren told him  
20 he had "maxed out to the [Babin] campaign," meaning that he had contributed his legal limit. *Id.*  
21 at 119. In his response to the Commission's subpoena and order, Mr. Whetsell stated that  
22 Mr. Cloeren also said he "wished he could do more for the campaign" and "told [Whetsell] to

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1 call his secretary . . . if there was anything further he could do . . . .”

2 Concerning Dr. Babin’s and Mr. Whetsell’s alleged complicity in the reimbursement  
3 scheme, the Commission took no further action in MUR 4783 regarding all related RTB findings  
4 made against them.<sup>7</sup> Regarding the complaint’s allegations that were transferred to MUR 4736,  
5 Mr. Cloeren asserts that a series of conversations, beginning in August 1996, led him to make  
6 contributions to CUPVF and to CR in October and November 1996, with the explicit  
7 understanding that those groups would assist the Babin Committee.

8 **4. Events from Mid-1996**

9 The complaint alleges that at an August 29, 1996 Babin campaign event in Orange,  
10 Texas, Rep. Tom DeLay asked Mr. Cloeren if he could raise more money for the  
11 Babin Committee. When Mr. Cloeren told Mr. DeLay that he was “out of vehicles,” Mr. DeLay  
12 allegedly told Mr. Cloeren that “‘additional vehicles’ were not a problem” and suggested that  
13 Mr. Cloeren could “funnel” money through “Triad and other congressional campaigns” to the  
14 Babin campaign. Mr. DeLay also allegedly indicated that his aide, Robert Mills, would contact  
15 Mr. Cloeren about how to arrange such activity.<sup>8</sup> Further, the complaint alleges that Mr. Mills  
16 telephoned Mr. Cloeren on August 30 to generally explain how Mr. Cloeren could make  
17 contributions to PACs, as well as other congressional campaigns, and how it could be arranged  
18 that the PACs, or individual donors to the other congressional campaigns, to which Mr. Cloeren

<sup>7</sup> Based on the Babin Committee’s failure to refund or disgorge the reimbursed contributions within 30 days of learning of Mr. Cloeren’s guilty plea, *see* 11 C.F.R. § 103.3(b)(2), the Committee entered into a conciliation agreement with the Commission in MUR 4783 which included, *inter alia*, an admission by the Committee and its treasurer that they violated 2 U.S.C. §§ 441b(a) and 441f by “accept[ing] \$37,000 in illegal contributions from Peter Cloeren and Cloeren, Inc. that were made in the names of other persons.”

<sup>8</sup> The DeLay campaign and Mr. DeLay denied that either Mr. DeLay or Robert Mills suggested that Mr. Cloeren make contributions to the Babin Committee through other organizations or persons.

1 might contribute, could make corresponding contributions to the Babin Committee.

2 In their RTB response, Dr. Babin and Mr. Whetsell acknowledge meeting with  
3 Mr. Cloeren, Rep. DeLay and staff from his campaign on August 29, 1996. However, they  
4 "categorically deny that they heard either Mr. Cloeren's plans for illegal fundraising or plans for  
5 future illegalities involving . . . PACs . . . ." Further, they "deny any knowledge of conversations  
6 Mr. Cloeren may have had with" Rep. DeLay or his aide Robert Mills "on either the 29<sup>th</sup> or 30<sup>th</sup>  
7 of August 1996 regarding illegal schemes for funneling money to other organizations."

8 Sometime in the late summer or early fall of 1996, Jason Oliver, while working for Triad  
9 consultant Carlos Rodriguez, telephoned the Babin campaign to gather information in  
10 preparation for Mr. Rodriguez' in-person "political audit" of the campaign. Oliver Dep. Tr. at  
11 19, 116, 136, 178-80. Ms. Malenick and Mr. Rodriguez had instructed him to contact the  
12 Republican candidates' campaigns in the congressional districts Triad was considering for  
13 "education ads" to find out what issues the campaigns would like to see addressed.<sup>9</sup> *Id.* at 116-  
14 17. Mr. Oliver testified that he called the Republican congressional campaign in each of the  
15 districts where advertising was being considered, as a representative of Triad, to pose the  
16 question "[i]f an organization were going to do issue education in your district, . . . what would  
17 the top three or four issues be that you think need to be brought up?" *Id.* at 116, 122-29.  
18 Mr. Oliver testified that he did not mention CR by name in any of these telephone inquiries, and  
19 when asked, told the campaigns that he did not know what groups might be running ads. *Id.* at

<sup>9</sup> Mr. Oliver testified that he made his initial contacts with each of the campaigns in early 1996, to gather background and other information, including the "top three issues that your campaign will be running on" and the "top three issues you expect your opponent to be running on." Oliver Dep. Tr. at 29-30. A document purportedly created by Mr. Oliver pursuant to these contacts indicates that the Babin campaign "responded." The document listed Dr. Babin as one of three possible Republican nominees for the Second District and "recommend[ed] getting involved at the general election stage."

1 119.

2 Mr. Oliver testified that he prepared a chart of the issues suggested by the campaigns and  
3 provided this information to Ms. Malenick and Mr. Rodriguez. *Id.* at 120-21, 124-25.<sup>10</sup>

4 Mr. Oliver identified a document produced by one of the advertising vendors as being a  
5 subsequent version of the chart on which he recorded the campaigns' advertising preferences. In  
6 many instances, the topics listed in this chart reflect the focus of subsequent CR advertising in  
7 that media market or congressional district. The entry on Jason Oliver's chart for the  
8 congressional race in which Brian Babin was facing Democrat Jim Turner states: "Turner: State  
9 jails[,] Homo rights[,] Taxes on sm. Bus[.], Auto probation to serious offenders."

10 On September 4, 1996, Triad consultant Carlos Rodriguez visited Babin campaign  
11 headquarters in Woodville, Texas to conduct one of many "political audits" of Republican  
12 congressional campaigns. Dr. Babin testified that he talked with Mr. Rodriguez for no longer  
13 than 30 minutes, primarily concerning the viability of his campaign. Babin Dep. Tr. at 194, 215.  
14 Dr. Babin did not recall Mr. Rodriguez informing him how Triad might help the campaign, but  
15 "was under the impression that it was some kind of a PAC" that "might help us," such as through  
16 an endorsement or contribution. *Id.* at 195-201, 215. The Triad political audit report from the  
17 meeting with the Babin campaign states that "Jim Turner is a career politician who has been in  
18 elected office for the last 14 years and who has a number of votes that could be used effectively  
19 against him in the general election this year. [State] Senator Turner sponsored legislation that  
20 grants automatic probation to first time felony offenders for such crimes as grand theft, burglary

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<sup>10</sup> Mr. Rodriguez testified that he did not recall ever asking Mr. Oliver to contact any campaigns to discuss the advertising efforts, and that he has no recollection of ever being aware of any such contacts. Rodriguez Dep. Tr. at 303-06.

1 and even drug dealing. In addition, he has voted for homosexual rights . . . .”

2 Although Mr. Rodriguez generally professed to have little or no recollection of his  
3 conversations with candidates or their campaign staff during audit visits to specific campaigns,  
4 he testified that his audit reports were dictated immediately after his visits with the campaigns,  
5 while the conversations were still fresh in his mind. Rodriguez Dep. Tr. at 164-65, 320.

6 Mr. Rodriguez testified that he recalled visiting the Babin campaign and speaking with Dr. Babin  
7 about the same subjects that he typically raised with the other campaigns he visited, including:  
8 “How much [money] they needed to win the election. How much they had on hand. How they  
9 were going to raise the money. How they were going to spend the money. What the key issues  
10 [sic] here.” *Id.* at 362-68. Mr. Rodriguez does not recall having any further discussions with the  
11 campaign, and does not recall ever speaking to Mr. Cloeren. *Id.*

12 **5. Background of CUPVF Contributions**

13 In his sworn complaint, Cloeren states that, following the August 1996 conversations  
14 with Messrs. DeLay and Mills regarding “vehicles” through which Mr. Cloeren could make  
15 additional contributions to the Babin Committee, Dr. Babin asked Mr. Cloeren to make a \$5,000  
16 contribution to CUPVF. According to the complaint, Dr. Babin told Mr. Cloeren that CUPVF  
17 had agreed to make a \$5,000 contribution to the Babin Committee in exchange for Mr. Cloeren’s  
18 contribution to CUPVF. FEC disclosure reports and a copy of Mr. Cloeren’s check submitted by  
19 CUPVF indicate that Mr. Cloeren wrote a \$5,000 contribution check dated October 7, 1996, that  
20 CUPVF reported receiving this contribution on October 14, 1996, that CUPVF made a \$5,000  
21 contribution to the Babin Committee on October 24, 1996, and that the Babin Committee  
22 reported receiving a \$5,000 contribution from CUPVF on October 26, 1996.

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1 Mr. Cloeren claimed that Dr. Babin initially solicited the CUPVF contribution in "late  
2 September or early October, 1996." Mr. Cloeren also stated that "Dr. Babin pressed Mr. Cloeren  
3 for this contribution for several days in phone calls to Mr. Cloeren's office." Telephone records  
4 produced by the Babin Committee show at least twelve telephone calls being placed from the  
5 campaign headquarters to Mr. Cloeren's office at Cloeren Inc. between September 13 and  
6 October 8, 1996, lasting between three and eight minutes.<sup>11</sup> Although the complaint did not  
7 specifically mention Triad or its president, Carolyn Malenick, in connection with the CUPVF  
8 contribution, Mr. Cloeren submitted an affidavit to investigators from the House Committee on  
9 Government Oversight in August 1998, in which he stated his understanding that Triad and  
10 CUPVF were connected, because the persons soliciting his contributions "constantly referred to  
11 Triad" while discussing both CUPVF and CR.

12 Dr. Babin and the Babin Committee submitted a response to the Commission's RTB  
13 findings which denied that Dr. Babin had personally solicited Mr. Cloeren's contribution to  
14 CUPVF. In support of this denial, Dr. Babin and the Babin Committee submitted a campaign

<sup>11</sup> The following chart lists the date, time of day and duration of each telephone call:

Date	Time	Duration in Minutes
09/13/96	11:01 AM	3
09/13/96	8:00 PM	4
09/17/96	2:46 PM	6
09/20/96	9:29 AM	3
09/20/96	4:18 PM	3
09/25/96	12:37 PM	8
09/26/96	2:22 PM	3
09/27/96	12:10 PM	6
09/30/96	12:29 PM	3
10/06/96	10:51 PM	3
10/07/96	12:53 PM	3
10/08/96	3:11 PM	8

1 scheduling record purporting to show that Dr. Babin was speaking at an event "over 150 miles  
2 away [from Cloeren, Inc.]" on October 7, 1996 in Huntsville, Texas, and therefore would have  
3 been unable to personally solicit the check Mr. Cloeren wrote to CUPVF on that date.

4 In response to the Commission's written questions, Dr. Babin and the Babin Committee  
5 asserted that they have no information about any communications pertaining to Mr. Cloeren's  
6 CUPVF contribution. Dr. Babin testified that he did not recall ever soliciting Mr. Cloeren's  
7 contribution to CUPVF, and that he had not heard of CUPVF or Citizens United president  
8 Floyd Brown until after the complaint was filed in 1998. Babin Dep. Tr. at 228-31. Mr. Brown,  
9 however, testified that he specifically remembers meeting Dr. Babin during the 1996 election  
10 cycle, when Dr. Babin visited his Fairfax, Virginia office. Brown Dep. Tr. at 151-59.  
11 Mr. Brown also testified that Dr. Babin also sent him "repeated solicitations." *Id.* at 175.  
12 CUPVF vice president Michael Boos testified that CUPVF made its contribution to the Babin  
13 Committee at the direction of Floyd Brown. Boos Dep. Tr. at 183-84. Mr. Brown testified that  
14 he did not recall whether there was any connection between Peter Cloeren's \$5,000 contribution  
15 to CUPVF and CUPVF's contribution in the same amount to the Babin Committee. Brown Dep.  
16 Tr. at 168-69.

17 Mr. Boos testified that Triad occasionally recommended candidates that it viewed as  
18 deserving of CUPVF's support, but that he was unaware of Triad being involved in CUPVF's  
19 decision to send money to the Babin campaign at that time.<sup>12</sup> Boos Dep. Tr. at 183-84.  
20 However, Mr. Boos testified he did recall Triad finance director Meredith O'Rourke

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<sup>12</sup> For example, Mr. Boos recalled Carolyn Malenick calling him in July 1996 specifically to ask that CUPVF make a contribution to the Sam Brownback for US Senate Committee. Boos Dep. Tr. at 110-11. On July 5, 1996, (cont'd. next page)

1 recommending that CUPVF make a contribution to the Babin Committee, after CUPVF had  
2 already made its October 24, 1996 contribution to the campaign.<sup>13</sup> Boos Dep. Tr. at 187-89.

3                   6.     Background of CR Contributions

4             Peter Cloeren states in his sworn complaint that, following his August 1996 conversations  
5 with Rep. DeLay and aide Robert Mills, he was asked to contribute \$20,000 to CR by Dr. Babin,  
6 Babin campaign consultant Walter Whetsell, and Triad president Carolyn Malenick. The callers  
7 allegedly represented CR as a non-profit corporation managed by Triad. The complaint states  
8 that Dr. Babin, Mr. Whetsell and Ms. Malenick each "confirmed that the money would be used  
9 by Citizens for Reform to support the Babin Campaign." The complaint also states that  
10 Mr. Whetsell pressed Mr. Cloeren to make the contributions by saying that CR and other persons  
11 and organizations "had already made the pre-agreed-upon contributions to Babin."

12             On November 1, 1996, Peter and Patricia Cloeren each contributed \$10,000 to CR. The  
13 complaint refers to a March 1998 Minority Report issued by the Senate Governmental Affairs  
14 Committee which states that "Citizens for Reform spent an unknown amount on television  
15 commercials attacking . . . [Babin opponent] Jim Turner" during the final weeks of the 1996  
16 congressional campaign as evidence that CR made an in-kind contribution to the Babin  
17 Committee in connection with the \$20,000 it received from the Cloerens.

18             CR stipulated that, acting under Triad's management, it spent \$87,000 to broadcast a

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CUPVF received \$5,000 in checks from Triad donors. On July 18, 1996, CUPVF sent the Brownback campaign a \$5,000 contribution check through Triad. *Id.* at 112-14, 159.

<sup>13</sup> Mr. Boos testified that when he spoke to Ms. O'Rourke around October 28 or 29, 1996, seeking contribution recommendations about close races, she specifically mentioned Brian Babin. Boos Dep. Tr. at 182, 187, 194. When told that CUPVF had already contributed the maximum amount to Dr. Babin, Ms. O'Rourke's "immediate reaction was, well, he still has a debt for the primary election. If you want to give some more money to the Babin campaign, they would love to have some more money." *Id.* at 194.

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1 30 second television advertisement called "Left" in the congressional district where Dr. Babin  
 2 was a candidate. It was run during the last week in October and the first week in November of  
 3 1996, identifies Rep. Turner by name, and criticizes his purported positions on the issues of  
 4 prisoners' rights and gay rights.<sup>14</sup> The entire text of the script is as follows:

5 TITLE: "Left"

#### VIDEO

Photo Super: The Jim Turner  
 Record  
 Photo  
 Background: jail  
 Super: automatic probation to  
 burglars, car thieves, and small-sale  
 drug dealers  
 Super: early release to criminals  
 Cite: HB-93  
 Super: hiring quotas for released  
 felons  
 HB-1281  
 Super: Gay Rights  
 Special Protection to Individuals  
 Cite: SB-141, 1995  
  
 Super: Criminals' Rights? Gay  
 Rights?  
 Photo  
 Phone #: 409-546-2000  
 Super: Tell him to Protect Texas  
 Values  
 Disclaimer: Paid for by Citizens for  
 Reform

#### AUDIO

The Jim Turner Record  
  
 Turner sponsored a bill that  
 grants automatic probation to  
 burglars, car thieves, and small-  
 sale drug dealers  
  
 He voted for a bill to give early  
 release to criminals . . .  
 . . . and he even voted for hiring  
 quotas for released felons  
  
 Turner also supported gay rights  
 by voting to add "sexual  
 orientation" to the list of  
 individuals given special  
 protection.  
 Criminals' Rights? Gay Rights?  
  
 Call. Tell Jim Turner you want  
 him to protect Texas values.

<sup>14</sup> Triad hired Gannon McCarthy, a vendor based in Washington, D.C., to produce the advertisement for CR. Triad has stated in writing that the vendors it hired to produce ads, including Gannon McCarthy, developed proposed scripts based on their own research into topics that would be relevant to public debate, and that Triad did not specify topics for any particular ad. However, responses and deposition testimony from other vendors, including Gannon McCarthy, indicate that Triad Inc. identified, discussed, or provided research materials regarding the issues to be addressed in the CR advertisements.

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3 Dr. Babin and the Babin Committee submitted a response to the Commission's RTB  
4 findings which denied that Dr. Babin or any representative of the Babin Committee solicited  
5 Mr. Cloeren to make any contribution to CR. Further, although Dr. Babin and the Babin  
6 Committee acknowledge meeting with Triad consultant Carlos Rodriguez to discuss their  
7 campaign in September 1996, they claim to have had no knowledge regarding the CR ad  
8 campaign prior to its broadcast. In response to the Commission's subpoena and order, Dr. Babin  
9 and the Babin Committee asserted that they had no information regarding the solicitation of the  
10 Cloerens' contributions to CR. Further, in their depositions, both Dr. Babin and Mr. Whetsell  
11 testified that they had no recollection of having ever solicited contributions to CR. Babin Dep.  
12 Tr. at 225-27; Whetsell Dep. Tr. at 148, 152-53. Dr. Babin testified that, to his knowledge,  
13 neither he nor his campaign staff ever spoke to Triad or CR about television advertisements.  
14 Babin Dep. Tr. at 218-19. He added that he never spoke to anyone from Triad following  
15 Carlos Rodriguez' "political audit" on September 4, 1996, and was unaware of any subsequent  
16 contacts between Triad and the Babin campaign. *Id.* at 212, 223. Contrary to Dr. Babin's  
17 testimony, however, the evidence shows extensive subsequent contacts between Triad and the  
18 Babin campaign.

19 Telephone records produced by the Babin Committee list at least 32 phone calls made  
20 from the campaign to Triad's Washington, D.C. office between September 13 and November 7,

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1 1996, lasting between three and nine minutes.<sup>16</sup> Dr. Babin testified that he did not make any of  
 2 these calls and did not know who did. *Id.* at 210-11. Mr. Whetsell testified that he did not  
 3 remember making the phone calls or having specific discussions about Triad or CR with  
 4 Dr. Babin or Mr. Cloeren. Whetsell Dep. Tr. at 132-33, 144, 147. He testified that his only  
 5 contacts with Triad were through Meredith O'Rourke, who served as Triad's finance director in

<sup>16</sup> The following chart lists the date, time of day and duration of each telephone call:

Date	Time	Duration in Minutes
09/13/96	10:03 AM	3
09/13/96	3:27 PM	9
09/15/96	6:05 PM	3
09/16/96	2:33 PM	3
09/16/96	12:55 PM	3
09/16/96	5:27 PM	3
09/17/96	2:52 PM	3
09/18/96	8:49 AM	3
09/18/96	2:15 PM	5
09/19/96	12:48 PM	3
09/30/96	2:36 PM	3
09/30/96	8:06 PM	7
10/02/96	12:27 PM	3
10/04/96	3:30 PM	3
10/10/96	10:29 AM	5
10/21/96	4:17 PM	8
10/23/96	11:13 AM	3
10/29/96	12:57 PM	5
10/29/96	3:31 PM	3
10/30/96	11:13 AM	4
10/30/96	11:14 AM	3
10/31/96	10:22 AM	3
10/31/96	12:56 PM	4
11/01/96	1:57 PM	3
11/03/96	3:53 PM	3
11/04/96	3:43 PM	5
11/04/96	4:01 PM	3
11/04/96	6:49 PM	3
11/04/96	7:03 PM	3
11/05/96	8:32 AM	3
11/05/96	11:21 AM	6
11/07/96	5:08 PM	3

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1 1996. *Id.* at 122-25. Mr. Whetsell believes he may have sent Triad a campaign press packet  
 2 pursuant to her request, but does not recall providing any other information. *Id.* at 137-39.

3 Although Mr. Whetsell testified that he did not recall referring any potential contributors to  
 4 Triad, *id.* at 125, Ms. O'Rourke testified that he provided her with Peter Cloeren's name, address  
 5 and telephone number.<sup>17</sup> O'Rourke Dep. Tr. at 371-72.

6 **7. Ms. Malenick's Fifth Amendment Assertion**

7 Carolyn Malenick asserted her Fifth Amendment privilege against self-incrimination  
 8 rather than submit to a deposition in this investigation. Therefore, this Office was not able to  
 9 obtain her version of communications she had with Mr. Cloeren, the Babin campaign, or CR.<sup>18</sup>

10 **C. ANALYSIS**

11 In weighing all the evidence gathered in the investigation, Peter Cloeren's version of the  
 12 events surrounding his contributions to CUPVF and CR is both credible and corroborated. The  
 13 evidence demonstrates that, through his communications with Dr. Babin, Mr. Whetsell, Triad  
 14 president Carolyn Malenick and others, Mr. Cloeren knew that the funds he contributed to

<sup>17</sup> Ms. O'Rourke also testified that, in 1996, she sent a request by facsimile to the treasurer of American Free Enterprise PAC, which instructed the treasurer to send a contribution check to the Babin campaign, "attention, Mr. Whetsell." O'Rourke Dep. Tr. at 377-79. Ms. O'Rourke testified that she sent such instructions to PACs at Carolyn Malenick's direction.

<sup>18</sup> Ms. Malenick's assertion of the Fifth Amendment also prevented obtaining her testimony whether she was quoted correctly in a press report on an October 1997 question and answer session regarding allegations raised in a 1997 Senate Governmental Affairs Committee Investigation. According to the article, Ms. Malenick reportedly:

acknowledged that in a few cases, the candidates themselves steered their own donors to her organization. Malenick would then match these donors with political action committees (PACs) who were likely to support that same candidate, in effect allowing the donor to give more money to the candidate - albeit indirectly and with no coordination, she said - than the maximum they would otherwise be able to give.

"Triad's Stealth Campaigns Elect Lawmakers," The Hill, October 8, 1997, p. 43.

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1 CUPVF and CR would be, as they were, contributed to or expended on behalf of Babin for  
2 Congress. Further, the CR advertising expenditure was coordinated with the Babin campaign  
3 and made for the purpose of influencing a federal election.

4 1. **Excessive Contribution through CUPVF**

5 As described earlier, Peter Cloeren was not politically active prior to his involvement in  
6 the Babin campaign. Indeed, the first political contribution he ever made, at either the state or  
7 federal level, was his \$1,000 primary election contribution to Babin for Congress in December  
8 1995, shortly after meeting Brian Babin. In the months that followed, Mr. Cloeren lent  
9 considerable support to Babin for Congress, both through legitimate fundraising and through the  
10 reimbursed contributions that were the subject of MUR 4783. During the 1996 election cycle,  
11 Mr. Cloeren and his wife made direct contributions totaling \$6,000 to Babin for Congress, the  
12 maximum allowed under the Act for the three elections in which Dr. Babin was involved. See  
13 2 U.S.C. § 441a(a)(1). Also, in addition to the \$37,000 in illegally reimbursed contributions, the  
14 Babin Committee's disclosure reports show that other Cloeren family members and employees  
15 made legitimate contributions as a result of Peter Cloeren's fundraising efforts. Dr. Babin  
16 testified that he considered Peter Cloeren to be one of his campaign's principal fundraisers, even  
17 offering him the position of "finance chair" for the campaign.

18 Much of Peter Cloeren's support, through either legal or illegal means, occurred prior to  
19 mid-1996, after Brian Babin had won the primary election and his campaign was gearing up for  
20 the general election campaign. Dr. Babin's handwritten note to Peter Cloeren dated August 5,  
21 1996, with references to "the money-machine" and "need[ing Cloeren's] help," demonstrate that  
22 Dr. Babin fully expected Mr. Cloeren to play an important role in raising general election funds.

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1 Moreover, as recounted in campaign consultant Walter Whetsell's responses and testimony,  
2 Mr. Cloeren wanted to further assist the Babin Committee even though he had "maxed out" his  
3 own contribution limit, and told Mr. Whetsell to call him "if there was anything further he could  
4 do."

5 In this context, it is entirely credible that Mr. Cloeren, at the August 29, 1996 campaign  
6 event attended by Dr. Babin, Rep. DeLay and campaign aides, would have discussed "additional  
7 vehicles" through which he could support the Babin campaign in the weeks leading up to the  
8 November election. Mr. Cloeren's account of the subsequent events is corroborated by a variety  
9 of evidence.

10 First, there are records of telephone calls from the Babin Committee to Mr. Cloeren's  
11 business during the period in late September and early October 1996 in which the CUPVF  
12 contribution was allegedly solicited. Mr. Cloeren has stated that Dr. Babin solicited the CUPVF  
13 contribution by telephone in late September and early October 1996, on days for which the Babin  
14 Committee's own telephone records show repeated calls being placed to Mr. Cloeren's office.  
15 Further, Dr. Babin stated that he sometimes personally retrieved contribution checks from  
16 Mr. Cloeren at Cloeren, Inc., which is consistent with Mr. Cloeren's account of the delivery of  
17 the CUPVF check.<sup>19</sup>

18 Second, the interrelationships between the Babin Committee, CUPVF and Triad support  
19 Mr. Cloeren's allegation that Dr. Babin solicited the CUPVF contribution from him, knowing

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<sup>19</sup> Mr. Cloeren asserted in writing that Dr. Babin picked up the CUPVF check on or about October 7, 1996. This Office does not regard the assertion that Dr. Babin had a speaking engagement 150 miles from Mr. Cloeren's office on the same day (at either 8 am or 8 pm, depending on interpretation of the scheduling record produced by Dr. Babin) as dispositive proof that Dr. Babin could not have picked up the check from Mr. Cloeren at some other time "on or about" October 7, 1996.

1 that the funds would be directed to his campaign. Triad had made specific contribution  
2 recommendations to CUPVF, including a recommendation that it support Dr. Babin during the  
3 general election. As mentioned, CUPVF vice president Michael Boos testified that he spoke  
4 with Triad finance director Meredith O'Rourke (to whom Peter Cloeren had been referred by  
5 Babin consultant Whetsell, according to Ms. O'Rourke's testimony) in late October 1996, at  
6 which time she encouraged him to make further PAC contributions to the Babin campaign.  
7 Moreover, CUPVF was part of Triad's "coalition" of PACs that received individual contributions  
8 through Triad during the 1996 election cycle, and the Babin Committee also received such  
9 contributions through Triad. Telephone records also show extensive contact between Triad and  
10 the Babin campaign during the relevant time period. Further, Floyd Brown, president of Citizens  
11 United, testified that Dr. Babin personally met with him and repeatedly solicited contributions  
12 from CUPVF.

13 Third, it is extremely unlikely that a political novice such as Peter Cloeren, whose main  
14 purpose in engaging in political activity in 1995 and 1996 was to support Dr. Babin's candidacy,  
15 would contribute to a political committee to which he had no other connection, based thousands  
16 of miles away, unless he received assurances from Dr. Babin or the Babin campaign that the  
17 funds would benefit his favored candidate. It can be no mere coincidence that CUPVF made a  
18 contribution to Dr. Babin ten days later, in the same amount as the Cloeren contribution to  
19 CUPVF.

20 These facts, taken together with Mr. Cloeren's sworn statement, support the conclusion  
21 that Dr. Babin solicited Mr. Cloeren to make a contribution to CUPVF with the knowledge that  
22 CUPVF would contribute the money to the Babin Committee. *See* 11 C.F.R. § 110.1(h).

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Therefore, there is sufficient evidence to conclude that Dr. Babin and the Babin Committee knowingly accepted an excessive contribution from Mr. Cloeren through CUPVF. Accordingly, this Office is prepared to recommend that the Commission find probable cause to believe that Brian Babin and Brian Babin for Congress and Thomas E. Freeman, as treasurer, violated 2 U.S.C. § 441a(f) by knowingly accepting a \$5,000 contribution from Peter Cloeren through CUPVF, and that Brian Babin for Congress and Thomas E. Freeman, as treasurer, violated 2 U.S.C. § 434 by failing to accurately report the source of the contribution.

The evidence also shows that there is probable cause to believe that the CUPVF contribution was earmarked for the Babin campaign. Mr. Cloeren's understanding about how his CUPVF contribution would be used, and Triad's involvement in steering the contribution from Mr. Cloeren to CUPVF and then from CUPVF to the Babin campaign, constituted a designation, instruction or encumbrance by Mr. Cloeren, which was effectively communicated to Triad, CUPVF and the Babin campaign. 2 U.S.C. § 441a(a)(8). Since CUPVF acted as a conduit or intermediary for the earmarked contribution, the Babin Committee was obligated to identify it as such in its reports to the Commission. 11 C.F.R. § 110.6(c). Because this information was not disclosed by the Babin Committee, this Office is prepared to recommend that the Commission find probable cause to believe that Brian Babin and Brian Babin for Congress and Thomas E. Freeman, as treasurer, violated 2 U.S.C. § 441a(a)(8).

## **2. Excessive Contributions through CR**

Peter Cloeren's version of events surrounding the CR contributions, as with his account of the CUPVF activities that occurred during approximately the same time frame, is also credible. Mr. Cloeren, who had never before contributed to an organization like CR, claims that



1 he made his contribution to CR at the request of Carolyn Malenick, as well as Dr. Babin and the  
2 Babin Committee, which had referred him to Triad, with the understanding that the funds would  
3 be used to assist Dr. Babin's campaign. Mr. Cloeren's account is corroborated by various  
4 deponents and other evidence.

5 Triad finance director Meredith O'Rourke confirmed in her deposition that campaign  
6 consultant Walter Whetsell referred Mr. Cloeren to Triad. Although Mr. Whetsell claimed in his  
7 deposition that he could not recall any such discussion, his statements to Mr. Cloeren during their  
8 recorded telephone conversation in 1998 confirm that the Babin campaign made the Cloeren  
9 referral. The transcript of this conversation also suggests that the Babin campaign had some  
10 level of knowledge regarding the upcoming CR advertising campaign. Mr. Whetsell specifically  
11 acknowledges that Mr. Cloeren contributed to Triad and that Triad provided a service to the  
12 campaign, and that he "thought it was TV."

13 The factual background leading up to the CUPVF contributions is similarly relevant to  
14 the Cloerens' CR contributions and supports Mr. Cloeren's version of events. As stated,  
15 Dr. Babin considered Peter Cloeren to be one of his campaign's principal fundraisers and  
16 expected him to "get the 'money-machine' again" during the last few months of the campaign to  
17 help Dr. Babin win the general election. Dr. Babin's August 1996 note to Mr. Cloeren  
18 emphasized the need for "dollars for television ads" to counteract his opponents' support from  
19 outside "lawyer and union money." In addition, in September 1996, Mr. Cloeren relayed his  
20 desire to the campaign to help Dr. Babin in whatever way he could after he had "maxed out," as  
21 confirmed by campaign consultant Walter Whetsell. In this context, and considering  
22 Mr. Cloeren's illegal conduct earlier in 1996 concerning the employee reimbursements, it makes

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1 sense that he would have favorably entertained requests only to contribute to outside groups who  
2 he was assured would use such funds to run ad campaigns solely on behalf the Babin Committee.

3 The evidence gathered in the investigation also shows that the campaign's participation in  
4 the CR advertisement rose to the level of coordination. The numerous phone calls made from the  
5 Babin campaign to Triad from September through early November 1996, following Triad's  
6 political audit of the Babin campaign and Jason Oliver's phone calls, occurred prior to and  
7 during the broadcast of the CR advertisement during the last week of October and first week of  
8 November. Although Messrs. Whetsell and Babin claimed no knowledge of these phone calls,  
9 given their timing and quantity, the most logical conclusion is that at least some of these calls  
10 included conversations about the CR advertisement and how to finance it. Indeed, some of these  
11 phone calls occurred on the same days that the Babin campaign also telephoned Peter Cloeren,  
12 further corroborating Mr. Cloeren's allegation concerning the link between the CR advertisement  
13 and his contribution to the organization.

14 Testimony and other objective evidence demonstrate that the content of the advertisement  
15 was the subject of discussions between the campaign and Triad representatives prior to its  
16 broadcast. In addition to the phone records discussed above, the evidence shows that  
17 Jason Oliver, while working for Triad consultant Carlos Rodriguez, contacted the Babin  
18 campaign to ask, if an organization was to run issue ads in the district, which "three or four  
19 issues" should be raised. He then transposed this information to a chart which included four  
20 issues in relation to the Second District, two of which (gay rights, automatic probation for serious  
21 offenders) were prominently featured in the CR ad. As described earlier, for several other  
22 campaigns that Jason Oliver contacted under similar circumstances, CR ran public advertising

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1 programs that corresponded to the issue/topic preferences communicated to Mr. Oliver by the  
2 specific campaigns.

3 Moreover, during Mr. Rodriguez' visit with Dr. Babin and the Babin Committee in  
4 September 1996, the same issues were discussed. The Triad political audit report of the Babin  
5 campaign, created by Triad consultant Carlos Rodriguez and based on his visit with Dr. Babin  
6 and his campaign staff, mentions votes by Jim Turner in the state legislature "that could be used  
7 effectively against him in the general election," including "automatic probation to first time  
8 felony offenders for such crimes as grand theft, burglary and even drug dealing." This language  
9 is very similar to the language used in the advertisement ("automatic probation to burglars, car  
10 thieves, and . . . drug dealers"). The audit report also mentions that Jim Turner "has voted for  
11 homosexual rights," the other issue prominently featured in the advertisement.

12 The Babin Committee's input in connection with the communications with Jason Oliver  
13 and Carlos Rodriguez, as well as other possible communications evidenced by the telephone  
14 records, constituted requests or suggestions from the campaign to run such an advertisement and  
15 also substantial discussions regarding the content of the advertisement. *See Christian Coalition*,  
16 52 F. Supp.2d at 92.<sup>20</sup> Further, the contacts between campaign consultant Whetsell and Triad  
17 finance director O'Rourke should be considered a request by the Babin Committee to run an ad  
18 campaign in the Second District, as it would be highly unusual for Mr. Whetsell to refer  
19 Peter Cloeren to Triad without an understanding that Triad would spend funds contributed by  
20 Cloeren solely on behalf of Mr. Whetsell's client. The transcript of Mr. Whetsell's conversation

<sup>20</sup> Pursuant to the Commission's new coordination rule, "[s]ubstantial discussion or negotiation may be evidenced by one or more meetings, conversations or conferences regarding the value or importance of the communication for a particular election." 11 C.F.R. § 100.23(c)(2)(iii).

1 with Mr. Cloeren, which contains simultaneous references by Mr. Whetsell to both the Cloeren  
2 contribution and what Triad "did . . . for us" shows that, in his mind, the Cloeren contribution  
3 was being used for Triad's advertising effort to support the Babin campaign.

4 Moreover, regardless of Mr. Cloeren's level of knowledge of the relationship between  
5 Triad and CR or the specific nature of the CR expenditure, as with the CUPVF contribution, it is  
6 extremely unlikely that he and his wife would have made such large contributions to an  
7 organization to which he had no other connection, based thousands of miles away, unless he  
8 received firm assurances from Dr. Babin and others that the funds would benefit his favored  
9 candidate. Therefore, his sworn statement that Dr. Babin, campaign consultant Walter Whetsell,  
10 and Triad president Carolyn Malenick confirmed to him that the \$20,000 contributed by him and  
11 his wife would be used by CR to support the Babin campaign, should be credited.

12 These facts, taken together with Mr. Cloeren's sworn statement, support the conclusion  
13 that Dr. Babin and others solicited Mr. Cloeren to make a contribution to CR with the knowledge  
14 that CR would spend the money on behalf of the Babin Committee. *See* 11 C.F.R. § 110.1(h).  
15 Therefore, there is sufficient evidence to conclude that Dr. Babin and the Babin Committee  
16 knowingly accepted excessive in-kind contributions from the Cloerens through CR.  
17 Accordingly, this Office is prepared to recommend that the Commission find probable cause to  
18 believe that Brian Babin and Brian Babin for Congress and Thomas E. Freeman, as treasurer,  
19 violated 2 U.S.C. § 441a(f) by knowingly accepting \$20,000 in excessive contributions from the  
20 Cloerens through CR, and that Brian Babin for Congress and Thomas E. Freeman, as treasurer,  
21 violated 2 U.S.C. § 434 by failing to report the contributions.

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1                   **3.     Coordination**

2           As described above, the Babin Committee's participation in the expenditure for the CR  
3 advertisement rose to the level of coordination. Further, although CR avoided using express  
4 advocacy, the efforts of Triad to coordinate the CR advertisement with the Babin campaign  
5 demonstrate that the purpose of the advertisement was to influence federal elections.<sup>21</sup> Triad's  
6 interaction with the Babin campaign insured that the CR advertisement would have the  
7 maximum effectiveness in garnering support against Brian Babin's opponent. "The fact that the  
8 candidate has requested or suggested that a spender engage in certain speech indicates that the  
9 speech is valuable to the candidate, giving [expressive] expenditures sufficient contribution-like  
10 qualities to fall within the Act . . . ." 52 F. Supp.2d at 92. Based on the *Christian Coalition*  
11 court's reasoning, Triad's use of the Babin campaign's requested or suggested advertising topics  
12 in the CR advertisement resulted in a coordinated expenditure of \$87,000, and represented an in-  
13 kind contribution of the same amount to the Babin Committee.

14           CR's expenditure for the advertisement on behalf of the Babin campaign far exceeded the  
15 \$1,000 threshold for political committee status under the Act. See 2 U.S.C. § 431(4)(A).  
16 Moreover, a, if not the, major purpose of CR was to influence federal elections, based on the  
17 evidence that a substantial portion of CR's advertising during the 1996 election cycle was  
18 coordinated with federal campaigns. Accordingly, all but the first \$1,000 of the \$87,000

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<sup>21</sup> In the *Christian Coalition* decision, the court also rejected the assertion that "express advocacy" was required for expenditures to be considered coordinated. *Christian Coalition*, 52 F. Supp.2d at 87-89. The district court stated that "importing the 'express advocacy' standard into § 441b's contribution prohibition would misread *Buckley* and collapse the distinction between contributions and independent expenditures in such a way as to give short shrift to the government's compelling interest in preventing real and perceived corruption that can flow from large campaign contributions." *Christian Coalition*, 52 F. Supp.2d at 88.

coordinated expenditure constituted an excessive in-kind contribution to the Babin Committee.

*See* 2 U.S.C. § 441a(a)(1)(A). Therefore, this Office is prepared to recommend that the Commission find probable cause to believe that Brian Babin and Brian Babin for Congress and Thomas E. Freeman, as treasurer, violated 2 U.S.C. § 441a(f) by knowingly accepting an excessive in-kind contribution of \$86,000 from CR, and that Brian Babin for Congress and Thomas E. Freeman, as treasurer, violated 2 U.S.C. § 434 by failing to report the contribution.


Alternatively, if CR is not a political committee, then the advertisement expenditure constituted a prohibited corporate contribution under the Act. Accordingly, this Office is prepared to recommend that the Commission find probable cause to believe that Brian Babin and Brian Babin for Congress and Thomas E. Freeman, as treasurer, violated 2 U.S.C. § 441b by knowingly accepting a corporate contribution of \$87,000 from CR, and that Brian Babin for Congress and Thomas E. Freeman, as treasurer, violated 2 U.S.C. § 434 by failing to report the contribution.

### **III. RECOMMENDATIONS**

1. Find probable cause to believe that Brian Babin violated 2 U.S.C. § 441a(f), and that Brian Babin for Congress and Thomas E. Freeman, as treasurer, violated 2 U.S.C. §§ 434, 441a(a)(8) and 441a(f).
2. Find probable cause to believe that Brian Babin violated 2 U.S.C. § 441b, and that Brian Babin for Congress and Thomas E. Freeman, as treasurer, violated 2 U.S.C. §§ 434 and 441b.

Date

8/6/01

  
Lois G. Lerner  
Acting General Counsel

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